IN THE
SUPREME COURT OF THE UNITED STATES

NO. 75-954

RAY A. HARRON
Petitioner,

vs.

UNITED HOSPITAL CENTER, INC., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fourth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

No. . . . . .

RAY A. HARRON,
Petitioner,

vs.

UNITED HOSPITAL CENTER, INC., a corporation; J.D.H. Wilson, individually and as President and Member of the Board of Directors of Monongahela Valley Hospital Service, Inc., and Medical-Surgical Service, Inc.,; D. Max Francis, individually and as Vice President of United Hospital Center, Inc.; Herbert G. Underwood; Cecil B. Highland, Jr.; Margaret Criswell; Oscar Andre; Luther Berry; Harry Berman; The Reverend Joseph DeBardi; Robert Hess, M.D.; James Jarvis; Graham Lynch; Sister Rita Marie VonBerg; Don P. Smith; William N. Walker,M.D.; Lynwood D. Zinn, M.D.; Donald E. West; E. Burl Randolph,M.D.; Clarence Fiber; individually and as Members of the Board of Directors of United Hospital Center, Inc., a corporation.
Monongahela Valley Hospital Service, Inc., and Medical-Surgical Service, Inc., a corporation.

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fourth Circuit

Ray A. Harron, M.D., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case (No. 75-1034) on September 8, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals does not yet appear in the Federal Reporter but is set forth in Appendix B hereto. The opinion of the District Court (Civil No. 73-26-C) is reported in 384 F. Supp 194 (N.D.W.Va. 1974) and set forth in Appendix C hereto.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1292(a). An opinion of a panel of the United States Court of Appeals for the Fourth Circuit in this case was filed

and entered on September 8, 1975. (Appendix B, infra) Thereafter a petition for Rehearing in Banc or in the Alternative Petition for Rehearing was filed on September 22, 1975 and denied by the Court of Appeals on October 7, 1975. (Appendix A hereto.)

QUESTIONS PRESENTED

This case presents the question of the scope of Congressional power exerted under the Sherman Act to prohibit (i) anticompetitive conduct in the provision of hospital services and (ii) monopolization of the provision of hospital services. This question arises in the context of the existence of a nationwide network of financing and providing health care services, a network which has evolved as a result of (i) the involvement of the federal government through Medicare and

Medicaid and (ii) the growth of national private health insurance companies such as Blue Cross, and (iii) federal and state financing in the construction of hospital facilities.

In particular, the questions presented are:

> 1. Is the provision of hospital services a purely local, intrastate activity, so that a provider of hospital services cannot, as a matter of law, state a claim for relief satisfying the "in commerce" test of the Sherman Act?
>
> 2. Is the impact on interstate commerce of a conspiracy to restrain or monopolize the provision of hospital services in the form of radiological services, so indirect and insubstantial that a physician cannot, as a matter of law, state a claim against the hospital for relief satisfying the "effect on commerce" test under the Sherman Act where the following facts are alleged as to all times pertinent in the case:
>
> (a) The hospital has received millions of dollars in financing from out of state lenders for the construction of its

facilities, including the radiology department

(b) The hospital, and its radiology department, purchased large sums of supplies and equipment, a substantial percentage of which was purchased from out of state suppliers.

(c) The hospital and its radiology department purchased management services from out of state entities.

(d) Under Health Insurance for the Aged (Medicare), 42 U.S.C. § 1395, et seq. the hospital received more than $2,000,000 for the fiscal year ending September 30, 1973, and substantial monies from other health insurance companies operating in interstate commerce are distributed annually to the hospital, the radiology department, and to radiologists who are on the medical staff of the hospital.

(e) Members of the medical staff are recruited on a temporary and permanent basis to work in the radiology department and in other departments of the hospital.

3. Did the District Court err in dismissing a Sherman Act complaint on the pleadings, either for failure to state a claim or for lack of jurisdic-

tion, without allowing any discovery and without the submission of any evidence as to those allegations.

STATUTES INVOLVED

1. The Sherman Act, Section 1 (15 U.S.C. § 1) provides in relevant part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal ..."

2. The Sherman Act, Section 2 (15 U.S.C. § 2) provides in relevant part:

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, ..."

STATEMENT OF THE CASE

A. Basic Facts

Petitioner Ray A. Harron, ("Dr. Harron") is a physician fully licensed to practice radiology in the State of West Virginia. For the period from 1961 until November 1, 1973, Dr. Harron practiced radiology as a member of the medical staff at United Hospital Center, Inc., ("UHC") and its two predecessor hospitals, Union Protestant and St. Mary's, both located in Clarksburg, Harrison County, West Virginia. On November 1, 1973, UHC officials ordered Dr. Harron off the premises and informed him that he could no longer practice radiology at UHC, which is a non-profit tax exempt community hospital supported by state and federal funds. It is the major medical facility in the region, the only hospital for the general public in

Harrison County, West Virginia, and the only hospital available to the physicians and surgeons of the region in treating their patients. Cited as authority for this unprecedented termination of the effective exercise of medical staff privileges was an unprecedented contractual concession entered on October 16, 1973 between UHC and J.D.H. Wilson ("Dr. Wilson"), another radiologist on the medical staff, which provided that Dr. Wilson would determine which radiologists would work at UHC, if at all, and their terms and conditions of employment, all of them to serve as his hired employees. Further, Dr. Wilson or his designated employee-radiologists were to perform all radiological work within the hospital, which required a minimum of 3-5 radiologists. Dr. Wilson was not and did not become an employee of the hospital but remained a private practitioner, billing

patients directly for services rendered. The hospital-owned x-ray equipment was placed under Dr. Wilson's exclusive control and restricted to his sole economic benefit as were the hospital-employed technicians who operated the equipment.

Prior to November 1, 1973, Dr. Harron and the other radiologists on the UHC medical staff all practiced as private practitioners, receiving referrals from physicians and surgeons, and billed directly to the patients for services rendered. In doing his work, each radiologist necessarily utilized the UHC facilities.

Dr. Harron had performed about forty percent of the radiological work at the hospital but after the grant of this exclusive and unprecedented contractual concession,Dr. Wilson performed 100% of

the radiological work there. Dr. Harron and the other radiologists who were then on the medical staff were reduced to nominal membership on the medical staff and the bar to the UHC facilities completely destroyed Dr. Harron's practice in the county and its environs , as radiology is performed almost entirely within a hospital setting.

While nothing in the by-laws or ethics of the profession distinguishes between radiology and other specialties of the medical profession, the facilities within other departments of the hospital - surgery, pediatrics,etc., remained available to each qualified specialist on the medical staff and these other hospital facilities were not subordinated to the control of one feudal overlord.

The attainment of Dr. Wilson's total domination over radiological services in

Harrison County was directly assisted and abetted by his central position in controlling health and hospital insurance rates and payments to UHC and to the physicians and surgeons in the area. Dr. Wilson is the president of Monongahela Valley Hospital Service, Inc. and Medical-Surgical, Inc. which are the principal health and hospital insurance payers in the area, these corporations effectively set the rates of compensation for services performed by UHC and the local medical practitioners and approve reimbursement on each specific claim. The economic life of UHC and each physician is directly affected by decisions made by Dr. Wilson in this capacity.

B. Proceedings in the District Court

Immediately after Dr. Harron was barred from exercising his medical staff

privileges at UHC or performing any radiological work there, a motion for a temporary restraining order was filed but denied. Following discovery directed to determining the circumstances of the actions taken by UHC, the District Court concluded that the "threshold question was procedural due process" and ordered a hearing, before a court-appointed hearing officer, "as to [Dr. Harron's] change of status and reduction of staff privileges effective November 1, 1973". (App. E-4) At the initial meeting of the administrative due process hearing, before the hearing officer, UHC conceded that it "had no charges to make against [Dr. Harron] which would justify, under the corporate bylaws of UHC, either termination or reduction of his staff privileges " , and that no basis existed to challenge Dr. Harron's competence and ethics. (App. C-8) At a subsequent proceeding before

the District Court, on October 24, 1974, UHC "reaffirmed that it had and has no 'charges' to assert against [Dr. Harron] .." (App. C-8)

With this conceded finding, the District Court concluded that no basis exists to sustain a change in Dr. Harron's medical staff or other privileges in the hospital and set forth the conclusion: "(1) the contract between UHC and defendant Wilson had and has the continuing effect of reducing [Dr. Harron's] medical staff privileges and status at UHC, (2) the reduction of [Dr. Harron's] privileges and status did not comport with the requirements of ... the UHC bylaws or procedural due process requirements of the Fourteenth Amendment, and (3) [Dr. Harron] is entitled to the protection of the Fourteenth Amendment by virtue of the involvement of Hill-Burton funds." (App. C-10)

The District Court ordered injunctive relief with the re-establishment of Dr. Harron's full and complete rights and privileges as a member of the medical staff in the radiology department, which included the right of other members of the medical staff to refer patients to Dr. Harron, and the right of Dr. Harron to have access to the facilities and personnel required for the performance of radiological work.

C. Proceedings in the Court Below

The Fourth Circuit Court of Appeals reversed the District Court's opinion and remanded with instructions "to dismiss the complaint for want of substantial federal question and consequent lack of jurisdiction." In so doing, the Court of Appeals held that "it is frivolous to urge that the employment of a single doctor to operate the radi-

ology department of a hospital invokes the Sherman Act and the civil rights statutes pleaded." (App.B-6)

The Court opinion adopts a story-book tone, commencing: "Once there were two hospitals ..." (App. B-2) In recounting the facts, the Court consistently mischaracterized the findings of fact of the District Court in critical respects.

The Court states that prior to the merger which formed UHC, Dr. Harron was the "exclusive" radiologist at one of the hospitals which entered into the merger and Dr. Wilson was at the other. (App.B-2) The District Court specifically stated that these radiologists were on the staff of both hospitals while each practiced primarily at one or the other. The Court of Appeals repeatedly suggests that the hospital has selected Dr. Wilson as "the radiologist of the hospital"

(emphasis in original), implying that Dr. Wilson is merely an employee, following a regular employment arrangement. To the contrary, the District Court found that the UHC-Dr. Wilson contract was a delegation of power to reduce the medical staff privileges of another radiologist, Dr. Harron. Further, nowhere in the District Court opinion is it even suggested that Dr. Harron seeks to "operate" the department or that he challenges Dr. Wilson's right to "operate" the department, i.e., administer the personnel and equipment.

To the contrary, the remedy ordered by the District Court does not affect Dr. Wilson's operation of the department. The injunctive relief is to allow Dr. Harron to examine patients in the department, utilizing the hospital's equipment in the same manner as a

surgeon on the medical staff who is in private practice and utilizes the operating rooms, hospital scalpels, oxygen tanks, etc., to perform his work. Membership on the medical staff is designed to allow private practitioners the use of hospital facilities for the treatment of patients. The Court of Appeals appears to imply that the practice of radiology requires a different arrangement, but such a view is nowhere to be supported by the record. It is a misperception to think a contract for the radiology department with the power to exclude other qualified radiologists on the medical staff is no more significant than a hospital contract with a hospital linen supply company or with some individual to operate a newstand and sell candies on the premises. These positions are rejected implicitly in the factual findings of the District Court and no elaborate discussion is needed to show the fallacy of such an approach.

Thus,the Court of Appeals disregarded the District Court's findings as to the rights inherent in medical staff privileges. To the District Court, Dr. Harron suffered a reduction in his medical staff privileges and status which required the restorative of injunctive relief. The Court of Appeals appears to view medical staff membership as an abstraction, to be defined by UHC or Dr. Wilson in whatever manner desired as it applies to Dr. Harron or the other radiologists on the medical staff who were not favored by Dr. Wilson. In reaching this conclusion, the Court of Appeals made no effort to discuss the case authority presented in support of the District Court's opinion nor was any authority examined in support of its own dismissal action.

The Court of Appeals not only reversed the injunction order but also

"took the unusual course of ending this litigation, although it comes before us as simply an appeal from the granting of a preliminary injunction." (App. B-4) The Sherman Act violations charged in the complaint (App. F) were also included in the dismissal although the points were not litigated before the District Court nor briefed or argued before the Court of Appeals.

REASONS FOR GRANTING WRIT

This case presents the central question of the scope of Congressional power exerted under the Sherman Act to prohibit anti-competitive conduct and monopolization of health care services, and arises from a dismissal by the Court of Appeals for the Fourth Circuit of a complaint alleging violations of the Sherman Act. The same question is presented in Hospital Building Company v. Trustees of The Rex Hospital, et al., October Term, 1975, (No. 74-1452) where this Court issued a writ of certiorari on October 6, 1975 to the same Court of Appeals, to review a decision, reported at 511 F.2d 678, which upheld the dismissal of a complaint alleging violations of the Sherman Act. This Court's decision in Hospital Building Company will determine for all practical purposes, whether health

care services are exempt from the Sherman Act and thus hospitals can act with physicians to raise the price of hospital services, by allocating the hospital and physician's services market in order to restrict output and hold prices at an artificially high level and thereby affect the bills paid by the federal government through Medicare and by the national health insurance companies.

A. This Court has granted a writ of certiorari in Hospital Building Company v. Trustees of The Rex Hospital, et al., October Term 1975, (No.74-1452) and will therefore determine during this Term the central Sherman Act questions presented in the instant case, Harron v. United Hospital Center, Inc., et al.

1. The grant of a writ to the Fourth Circuit Court of Appeals in

Hospital Building Company v. Trustees of The Rex Hospital, et al., October Term 1975, (No. 74-1452) establishes that this Court will consider whether anticompetitive conduct and monopolization of hospital services sufficiently affects commerce to come within the jurisdiction of the Sherman Act.

Already before this Court for review in Hospital Building Company, is the question of "the scope of Congressional power exerted in the Sherman Act to prohibit (1) anticompetitive conduct in providing hospital services and (2) attempted monopolization of hospital services" arising "in the context of a nationwide network of financing hospital services through Medicare (federal health insurance for the aged and disabled), Medicaid (federal grants to states with medical assistance programs), and national private health insurance companies."

(Brief of Petitioner, Hospital Building Company, at p.2.)

The review is of a decision by the Fourth Circuit Court of Appeals which had upheld the dismissal of the Hospital Building Company ("HBC") complaint alleging violations of Sections 1 and 2 of the Sherman Act, where HBC set forth that "the principal purpose of the alleged conspiracy was to hold the number of hospital beds in the relevant market at an artifically low level thereby restricting the output of hospital services and enabling HBC's two [hospital] competitors to fix prices, paid in large part through Medicare or by national health insurance companies, at an artifically high level." (HBC Writ Petition, p.6).

The Fourth Circuit Court of Appeals dismissal of the complaint was grounded on the view that the provision of hospital

services is, as a matter of law, a "purely local activity" (HBC Writ Petition, App. A-5) and that to state a claim for relief within the jurisdiction of the Sherman Act, the hospital, HBC, would need to allege a conspiracy having direct and substantial effect on interstate commerce, which the Fourth Circuit held was not present in the case.

HBC successfully urged this Court to review the decision by demonstrating that the Fourth Circuit opinion as to the breadth of the "effect on commerce" requirement of the Sherman Act conflicted with the Third Circuit position in Doctors, Inc. v. Blue Cross of Greater Philadelphia, 490 F.2d 48(3rd Cir. 1973). Also, the Fourth Circuit had applied a substantiality test more restrictive than and conflicting in principle with the decision of the Fifth Circuit in St. Bernard General Hospital, Inc.,

v. Hospital Service Assn. of New Orleans, Inc., 510 F. 2d 1121 (5th Cir. 1975).(HBC Writ Petition, p.33)

The HBC Writ Petition, at p. 18-20, noted that the Fourth Circuit opinion conflicted with other authority, both in this Court and among the Circuits. Burke v. Ford 389 U.S. 320 (1967) (per curiam); United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954); Rasmussen v. American Dairy Association, 472 F.2d 517 (9th Cir. 1972), cert denied 412 U.S. 950 (1973); A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Ass'n., 484 F. 2d 751 (7th Cir.1973), cert. denied, 414 U.S. 1131 (1974).

Additional reasons advanced for granting the writ included the question of the weight of the federal government in the financing and regulation of hospital services as an important question

in the application of the Sherman Act (HBC Writ Petition p.20-23), and the important question of federal law which has not been, but should be settled by this Court, to wit: whether the provision of hospital services is, as a matter of law, a purely local, intrastate activity (HBC Writ Petition ,p.23-27).

2. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975),reinforced the reasons advanced for granting the writ of certiorari in Hospital Building Company.

The HBC Petition for a writ was filed prior to the decision by this Court in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975),which reversed a Sherman Act decision of this same Fourth Circuit Court of Appeals.

The significance of Goldfarb was immediately noted as being of critical

importance to the reasons advanced by HBC for the issuance of a writ. (See, HBC Supplemental Brief in Support of Petition.)

Heavy reliance on Goldfarb as a basis for overturning the decision of the Fourth Circuit in Hospital Building Company is to be found in the Briefs filed after certiorari was granted, the brief filed by HBC, at p. 17,19, 22, 27, 28, 29, 31, 37, 38, 41 and throughout the Memorandum of the United States, appearing as amicus curiae, in the case before this Court. The HBC Brief argues that under Goldfarb a purely local conspiracy among hospitals can substantially affect interstate commerce if the activities restrained are an integral part of interstate transactions. The "in commerce" test of the Sherman Act is met, where there is a purchase of goods and services necessary to provide hospital services, and the

payments are made for these services by the federal government under its Medicare and Medicaid programs and by private health insurance companies, as the ultimate purchasers of hospital services. (HBC Brief, p. 27-29;37;41.)

The United States, as amicus, relies primarily on Goldfarb in urging reversal of the Fourth Circuit's ruling, arguing that under Goldfarb the magnitude of the anticompetitive effect upon commerce is immaterial and that the Sherman Act is invoked if the restraint "is imposed upon an activity (either local or interstate) which involves a substantial amount of commerce." (United States Memo., p.6-7).

B. The Sherman Act issues raised in Harron v. United Hospital Center, Inc., et al., the instant case, are the precise issues before this Court in Hospital

Building Company v. Trustees of The Rex Hospital, et al., October Term,1975, (No. 74-1452).

The HBC complaint contains various allegations as the basis for invoking the Sherman Act,including the interstate purchase of goods, supplies, and medicines, out of state patient treatment, revenue from the interstate financing of hospital and medical care and hospital construction. The same allegations are set forth in the Harron complaint. Moreover, in the instant case, Dr. Wilson, the radiologist who was given monopoly control of the UHC radiology department by the hospital, sits as the head of the vast interlocking health oligopoly in Harrison County, where he controls, as President, the defendant corporations which administer health and hospital insurance funds from national companies. Dr. Wilson is uniquely

situated to affect health insurance rates throughout the country. (App. F) He can set his own rates for radiological services, which will then be approved by these corporations he controls. Other radiologists in West Virginia will point to his rates as justification for increasing their rates, and, in turn, these rates will serve as justification for rate increases in adjoining states and ultimately throughout the country. Similarly, reimbursement to the hospital for its services is controlled by Dr. Wilson, acting through his health insurance corporations. The incentive to reward UHC for its grant of monopoly power over the radiology department is present, with its ripple effect on hospital reimbursement throughout the country. In either event, premium increases for policyholders are inevitable.

None of these Sherman Act matters were ever considered by the District Court, as it focused attention only on the due process issues raised in granting injunctive relief. (App. C-2). The Fourth Circuit, in reviewing the injunctive order as to which there were no disputed facts, chose to terminate the entire litigation, though the Sherman Act issues were neither briefed nor argued.

Though the Court of Appeals below did not detail its basis for so acting, the grounds for the dismissal must have been the same as in Hospital Building Company. First, the Harron case came on appeal only a few months after en banc consideration by the Fourth Circuit of Hospital Building Company.

Second, the UHC Brief to the Court of Appeals challenging the "due process" injunctive order of the District Court

advanced the argument that Dr. Harron's Sherman Act contentions were without merit on the grounds "that neither the practice of medicine nor the operation of a community hospital constitutes 'interstate commerce' to which the Sherman Act applies." UHC acknowledged that the District Court had not considered the antitrust claims but cited, as authority, the same line of cases which the HBC Writ Petition to this Court distinguishes as not controlling.(UHC Appellant's Brief to the Fourt Circuit Court of Appeals, No. 75-1034, p.58; HBC Writ Petition p. 23-24.)

Third, the language of the Court in minimizing the case as involving "a single doctor" and therefore not under the Sherman Act establishes that the Court viewed the complaint as setting forth an insubstantial effect on commerce.

The question of "effect on commerce" and the substantialty of the effect on commerce by a local hospital is present in Harron as it is in Hospital Building Company, even though the Fourth Circuit's reason for dismissing the Harron complaint is sparse, couched in formulaic terms - the dismissal of the complaint is "for want of a substantial federal question and consequent lack of jurisdiction". (App. B-6). Also, in Hospital Building Company, the dismissal of the complaint occurred without discovery as to the antitrust issues and without any submission of evidence on these points. (HBC Brief, p.45.)

CONCLUSION

The Fourth Circuit Court of Appeals has displayed a persistent refusal to apply the requirements of the Sherman Act to the provision of legal and health care services. In Goldfarb v. Virginia State Bar, supra, this Court reversed a Fourth Circuit decision which refused to impose Sherman Act requirements on the legal profession. In Hospital Building Company v. Trustees of The Rex Hospital, supra, the Fourth Circuit determined that the Sherman Act did not reach the provision of local health care services while Goldfarb was pending before this Court. This Court will now determine the reach of the Sherman Act as to local health care services and settle the conflict between the Circuits created by the Fourth Circuit. In Harron v. United Hospital Center, Inc., et al., supra, the instant case, decided after Goldfarb

but prior to the grant of the writ in Hospital Building Company, the Fourth Circuit ignored Goldfarb in another case involving the provision of local health care services. The reach of the decision of this Court in Hospital Building Company will determine whether the Fourth Circuit's decision was in compliance with the controlling authority of this Court.

Inasmuch as the precise issues presented in Harron are already on review in Hospital Building Company and the briefing in the latter case is well advanced, and the matter may be set for argument within the next few months, the Court may deem it appropriate to hold the petition in this case pending disposition of Hospital Building Company. If the Fourth Circuit decision there is reversed, the Court could grant the writ in Harron v. United Hospital Center, Inc.,

et al., supra, and then return the case to the Fourth Circuit for action consistent with the principles enunciated therein.

To deny the writ requested here and allow this case to die now with its ruling adverse to Dr. Harron, where the central issues may soon be decided to Dr. Harron's advantage, would be to make him the victim of a cruel fortuity of timing, either that he was too late to be the first case to raise the issues or too soon to get the benefit of the Court's decision.

Dated: January 5, 1976

Respectfully submitted,

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APPENDIX

APPENDIX A

Order

(Filed October 7, 1975)

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 75-1034

Ray A. Harron,

Appellee,

versus

United Hospital Center, Inc., Clarksburg, West Virginia, a corporation; D. Max Francis, individually and as Vice President of United Hospital Center, Inc.; Herbert G. Underwood Cecil B. Highland, Jr., Margaret Criswell, Oscar Andre, Luther Berry, Harry Berman, Joseph Debardi, Robert Hess, M.D., James Jarvis, Graham Lynch, Rita Marie vonBerg, Don P. Smith, William N. Walker, M.D., Lynwood D. Zinn, M.D., Donald E. West, E. Burl Randolph, M.D., Clarence Fiber, individually and as members of the Board of Directors of United Hospital Center, Inc., a corporation,

Appellants.

Upon consideration of appellee's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is, therefore, ORDERED, That the petition for rehearing be and it is hereby denied.

For the Court - By Direction.

/s/ William K. Slate,II
Clerk

APPENDIX B

Opinion

(Decided September 8, 1975)

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 75-1034

Ray A. Harron,

Appellee,

versus

United Hospital Center, Inc.,Clarksburg, West Virginia, a corporation; D. Max Francis, individually and as Vice President of United Hospital Center, Inc. ; Herbert G. Underwood, Cecil B. Highland, Jr., Margaret Criswell, Oscar Andre, Luther Berry, Harry Berman, Joseph Debardi, Robert Hess, M.D., James Jarvis, Graham Lynch, Rita Marie vonBerg, Don P. Smith, William N. Walker, M.D., Lynwood D. Zinn, M.D., Donald E. West, E. Burl Randolph, M.D., Clarence Fiber, individually and as members of the Board of Directors of United Hospital Center, Inc., a corporation,

Appellants.

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg. Robert E. Maxwell, District Judge.

Argued July 7, 1975
Decided September 8, 1975

Before CRAVEN, BUTZNER, and FIELD,
Circuit Judges.

John S. Hoff, (James E. McNeer; Clara L. Mattern; Leva, Hawes, Symington, Martin and Oppenheimer; McWhorter, McNeer, Highland and McMunn; Horty, Springer and Mattern on brief) for Appellants; David Epstein, (Jerald E. Jones; Jones Williams, West and Jones on brief) for Appellee.

PER CURIAM:

Once there were two hospitals in Clarksburg, West Virginia. They merged in 1970, and now there is only one--the defendant United Hospital Center. When there were two hospitals, the plaintiff, Dr. Harron, was the exclusive radiologist at one, and Dr. Wilson was the exclusive radiologist at the other. For some time after merger, the new hospital operated an "open staff" radiology department permitting both Drs. Wilson and Harron to act as hospital radiologists and use the hospital's

radiology equipment. When this arrangement proved unsatisfactory to the hospital, its board of directors entered into a contract with Dr. Wilson on November 1, 1973. The contract effectively made Dr. Wilson the radiologist of the hospital with the responsibility to direct the department of radiology at the hospital and to be responsible for the initial interpretation of all studies of the hospital radiology department and for the administration of all treatments therein. Something was left for plaintiff, Dr. Harron, but not very much. Paragraph 11 of the contract provided that any radiologist who is a member of the hospital medical staff shall not be prevented from making readings and studies of X-ray films of the hospital radiology department and entering his opinion on the chart of any hospital patient if

requested to do so by the patient's attending physician, for which service such radiologist may make a direct charge to the patient.

Dissatisfied with the hospital's choice of Dr. Wilson to be its radiologist Dr. Harron sued in the United States District Court and, inter alia, sought a preliminary injunction against the hospital to require it to restore him to the position he occupied prior to the contract with Dr. Wilson. The district court granted such an injunction, but stayed its effectiveness pending appeal.

Dr. Harron's brief concedes that "there are no unresolved questions of fact ...." We agree, and because we do, we take the unusual course of ending this litigation, although it comes before us as simply an appeal from the granting of a preliminary injunction. The facts were

fully developed before a Special Master, who had been directed by the district judge to conduct a due process hearing to determine the hospital's justification, if any, for termination or reduction of Dr. Harron's staff privileges.[1] But at the hearing it developed that the hospital had no charges of any sort whatsoever to make against Dr. Harron, and instead took the simple position that as a corporate entity it had the right to contract with Dr. Wilson to operate the hospital's radiology department. The hospital agrees that Dr. Harron is an able and competent radiologist fully qualified to practice his profession in Clarksburg or elsewhere in West Virginia.

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1. Dr. Harron does not suggest invidious discrimination; no question of pretensive preference is presented.

It levels no accusations of misconduct or bad character against Dr. Harron. It agrees that as a member of the hospital medical staff Dr. Harron is entitled to staff privileges. It insists only that he may not compel the hospital to permit him to operate its radiology department.

We do not, of course, reach the merits of the so-called contract dispute. The complaint purports to be based upon 42 U.S.C. § § 1981, 1983, and 1985 and 15 U.S.C. § 1. Jurisdiction is said to be granted by 28 U.S.C. § 1343(3), (4). Whatever may be the law of contracts, it is frivolous to urge that the employment of a single doctor to operate the radiology department of a hospital invokes the Sherman Act and the civil rights statutes pleaded. On remand, the district court will be instructed to dismiss the complaint for want of a

substantial federal question and a consequent lack of jurisdiction. Bell v. Hood, 327 U.S. 678 (1946); see C. Wright, The Law of Federal Courts 62 (2d ed. 1970).

REVERSED AND REMANDED WITH INSTRUCTIONS.

APPENDIX C

Memorandum Order

(Filed November 6, 1974)

IN THE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF
WEST VIRGINIA

RAY A. HARRON,
Plaintiff,

v. Civil Action File No. 73-26-C

UNITED HOSPITAL CENTER, INC.,
et als.,
Defendants.

This is an action brought by Ray A. Harron, a radiologist and a member of the medical staff of United Hospital Center, Inc. (hereinafter referred to as UHC), against UHC, its Board of Directors and other named defendants. Plaintiff seeks declaratory and injunctive relief and damages on several theories pleaded in separate counts of his complaint. The only relief sought now considered

is the claim for injunctive relief in Count 1 of the complaint. In this count, plaintiff sues under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4), asserting that his staff privileges at UHC were "effectively terminated" or reduced without affording him procedural due process.

Plaintiff Harron is a duly qualified and licensed physician with a specialty in radiology. In the era of 1960 he became a member of the medical staffs of Union Protestant Hospital and St. Mary's Hospital, the two general hospitals in Clarksburg, West Virginia. He practiced his profession primarily at the former hospital. Defendant J.D.H. Wilson, also a radiologist, likewise was a staff member of both hospitals, but practiced primarily at St. Mary's.

In 1970, the two hospitals, Union Protestant and St. Mary's, were merged

into United Hospital Center, Inc., a non-stock, non-profit corporation organized and existing under the laws of the State of West Virginia. UHC was successful in negotiating contracts for services with physicians who had been parties to contracts with its corporate predecessors, with the exception of plaintiff Harron and defendant Wilson. The contracts of these physicians with UHC's corporate predecessors were extended through 1971, and in 1972 a system was established whereby a patient's attending physician was permitted to designate either plaintiff's "group" or defendant Wilson's "group" of radiologists for the performance of radiological services. This arrangement for the operation of the radiology department proved unsatisfactory. The UHC Board of Directors, acting on the recommendation of the Joint Conference

Committee to secure a contract with a radiologist, retaining open staff privileges for other radiologists, caused the formation of a special committee on radiology. This special committee retained a consultant, met with the Board of Directors, members of the medical staff and the Executive Committee of the medical staff, and ultimately concurred with the initial decision of the Board of Directors that a contractual relationship with a single entity was the best solution to the problem. This decision was communicated to plaintiff, defendant Wilson and the two other staff radiologists on June 8, 1973. The four radiologists were given a deadline of July 1, 1973, for the creation of a single entity with which UHC could contract. No such entity was formed by the radiologists, and at the next regular meeting of the Board of Directors that body voted unanimously to

enter into negotiations with defendant Wilson for a contract for radiological services. Despite plaintiff's opposition, the president of the Board of Directors entered into a contract with defendant Wilson on November 1, 1973.

Plaintiff alleges that the contract entered into between defendants UHC and Wilson, particularly the fifth and eleventh clauses thereof [1], constituted an "effective removal" of himself and other radiologists from the medical staff, in that defendant Wilson was given the sole responsibility for all initial x-ray interpretations, and that subsequent interpretations, if requested by the attending physician, involved a direct charge to the patient. Harron asserts that this "effective removal" from the staff, or reduction in staff privileges, was made in violation of §§5.03b and

7.04 of the hospital's bylaws[2] and contrary to the procedural due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution.

This action was instituted on November 15, 1973. Following a hearing on November 21, 1973, plaintiff's motion for a temporary restraining order and/or preliminary injunction was denied, as reflected in the Court's order of December 8, 1973, and counsel were ordered to proceed with the pre-trial development of the action. Extensive discovery was undertaken, a pre-trial order was submitted, and on May 13, 1974, a conference was scheduled on various matters pending in the action. At this conference, the Court overruled the various defense motions without prejudice to the defendants to renew them, and after hearing argu-

ments of counsel, concluded that (1) the contract between UHC and defendant Wilson had the effect of reducing plaintiff's staff privileges at UHC; (2) the involvement of the federal and state governments through Hill-Burton funds was sufficient to subject UHC to the restrictions which the Fourteenth Amendment places upon state action; and (3) that the reduction of plaintiff's staff privileges did not comport with the due process requirements of the hospital's bylaws or the Fourteenth Amendment.

The Court, relying upon the teachings of Christhilf v. The Annapolis Emergency Hospital Association,Inc., 496 F.2d 174 (4th Cir. 1974), ordered that an administrative due process hearing, with the requisite panoply of procedural rights outlined in Christhilf, be held before an impartial hearing officer ap-

pointed by the Court.

A challenge as to the sufficiency of the notice given to plaintiff and the illness of one of counsel necessitated a delay in the conduct of the administrative due process hearing. At the initial meeting for the conduct of the administrative due process hearing, it developed that the hospital had no charges to make against plaintiff which would justify, under the corporate bylaws of UHC, either termination or reduction of his staff privileges. Under these circumstances, it became apparent that nothing further could be accomplished by the conduct of further hearings before the hearing officer.

Further proceedings in this matter were held on October 24,1974. At this hearing UHC reaffirmed that it had and has no "charges" to assert against plain-

tiff, but reiterated its earlier contentions that (1) plaintiff's staff privileges were and are unaffected by the contract between UHC and defendant Wilson, (2) the determination to enter into this contractual relationship was a policy decision designed to provide optimal patient care with a minimum of exposure to potential liability, and (3) the policy decision to enter into this contract was within the lawful authority of the Board of Directors to which due process requirements are inapplicable.

The Court has previously rejected, implicitly and explicitly, the arguments advanced by UHC and its Board of Directors, and nothing has been offered or submitted which persuades the Court to vary from this position. Thus, the Court, reaffirming its earlier determination finds that (1) the contract between UHC

and defendant Wilson had and has the continuing effect of reducing plaintiff's medical staff privileges and status at UHC, (2) the reduction of plaintiff's privileges and status did not comport with the requirements of §§5.03b and 7.04 of the UHC bylaws or procedural due process requirements of the Fourteenth Amendment, and (3) the plaintiff is entitled to the protection of the Fourteenth Amendment by virtue of the involvement of Hill-Burton funds.

Accordingly, it is ORDERED that United Hospital Center, Inc., and the members of the Board of Directors of United Hospital Center, Inc., defendants herein, and their agents, servants and employees are (1) enjoined to re-establish the full and complete rights and privileges of plaintiff Harron as a member of the medical staff in the Depart-

ment of Radiology which were in effect prior to November 1, 1973; (2) ordered to permit members of the medical staff to refer patients to plaintiff for examination or treatment to the same extent as prior to November 1, 1973; (3) ordered to provide plaintiff Harron with access to the facilities and personnel required for the performance of radiological work as was in effect prior to November 1, 1973, and on the same basis as extended to defendant Wilson; and (4) that those patients, from whatever source, who are not designated by the referring physician to a specified radiologist be assigned on a rotating basis to each principal radiologist on the medical staff.

It is further ORDERED that the relief granted herein shall be preliminary in nature, subject to being either dissolved or made permanent upon final hear-

ing and determination by the Court, and shall take effect upon the posting by plaintiff of a bond in the sum of $25,000.00.

It is further ORDERED that counsel for all parties prepare and submit to the Court within 60 days of the entry of this order, a final pre-trial order relating to all aspects of this litigation not encompassed by this order.

It appears to the Court that this order is appealable to the United States Court of Appeals for the Fourth Circuit under the provisions of 28 U.S.C. §1292 (a) (1), but in the event this statutory provision is determined to be inapplicable, the Court determines and is of opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal

may materially advance the ultimate termination of the litigation, within the meaning of 28 U.S.C. §1292 (b).

ENTER: November 6th, 1974.

/s/ Robert E. Maxwell
United States District Judge

FOOTNOTES

1 A copy of the contract is part of the record. The fifth and eleventh clauses read as follows:

FIFTH: The Radiologist shall direct the department of radiology at the Hospital, serve as its head, and devote his best ability to its proper management. The Radiologist shall consult with members of the Hospital Medical Staff in proper cases and shall be responsible for the initial interpretation of all studies of the Hospital Radiology Department and be responsible for the administration of all treatments therein.

The Radiologist shall confine his practice to the Hospital except when practice at other institutions or locations is agreed to by the governing board of the Hospital in an appropriate document. By the execution hereof the governing board of the Hospital hereby agrees to the continuation of the Radiologists' contractual relationships with St. Joseph's Hospital, Buckhannon, West Virginia, Weston State Hospital, Weston, West Virginia, and the Veteran's Administration Hospital, Clarksburg, West Virginia, and to his private office practice in Bridgeport, West Virginia.

* * * * * * * * * * *

ELEVENTH: Nothing herein shall be deemed to prevent any radiologist who is a member of the Hospital Medical Staff from making readings and studies of X-ray films of the Hospital Radiology Department additional to the provisions of paragraph

FIFTH hereof, and entering his opinion on the chart of any Hospital patient if requested to do so by the patient's attending physician, for which service such radiologist may make a direct charge to the patient.

2

The bylaws provide in pertinent part that:

[5.03b]

"Each recommendation concerning the reappointment of a medical staff member and the clinical privileges to be granted upon reappointment shall be based upon such member's professional competence and clinical judgment in the treatment of patients, his ethics and conduct, his attendance at medical staff meetings and participation in staff affairs, his compliance with the hospital bylaws and the medical staff bylaws, rules and regulations, his cooperation with hospital personnel, his proper use of the hospital's facilities for his patients, his relations with other practitioners, and his general attitude toward patients, the hospital and the public."

[7.04]

"Every appointment to the Medical Staff shall be until the end of the then current calendar year.

"When an appointment to the Medical Staff is not to be made or renewed, or when privileges have been or are proposed to be reduced, suspended or terminated, the applicant or staff member concerned

shall be entitled to a hearing before the Joint Conference Committee provided for in Section 3.14 hereof at a session specially called for the purpose of holding such a hearing. Such hearing shall be conducted informally under procedures calculated to assure due process, a fair and impartial hearing and a full opportunity for the presentation of all pertinent information."

APPENDIX D

Order

(Filed July 8, 1974)

IN THE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF
WEST VIRGINIA

RAY A. HARRON,
Plaintiff,

v. Civil Action File No. 73-26-C

UNITED HOSPITAL CENTER,
INC., et al.,
Defendants

ORDER

Upon consideration of the record presently before the Court, including plaintiff's "Motion to compel compliance with this Court's order or in the alternative that defendant United Hospital Center, Inc.'s defenses to Counts I and II of the Complaint be stricken," and all matters offered in support thereof,

the Court is of opinion to and does hereby overrule plaintiff's motion, without prejudice to the same or similar issues and grounds being raised at a later time in the development of the litigation.

Supplementing the record earlier made in open court concerning the matters then and now before the Court, nothing has been presented to the Court by any of the parties which alters or modifies the Court's belief that the law governing the issues of this civil action as presently structured before this Court, are governed by four decisions out of the United States Court of Appeals for the Fourth Circuit, namely, Huntley v. The North Carolina State Board of Education, etc., decided March 21, 1974, case No. 73-1665; Christhilf v. The Annapolis Emergency Hospital Association, decided April 23, 1974, case No. 73-1717; Sams v.

Ohio Valley General Hospital Association, 413 F.2d 826 (1969); and Simkins v. Moses H. Cohen Memorial Hospital, 323 F.2d 959 (1963).

The motion presently before the Court would, in effect, ask the Court to define at this time the reasons, charges or details relative to the change in status or reduction of plaintiff's privileges to practice as a member of the medical staff of United Hospital Center after November 1, 1973. This is the responsibility of the defendant, United Hospital Center, in initiating a due process hearing.

It may well be, as urged by plaintiff, that the existing notice to plaintiff, dated May 28, 1974, is overbroad and fails to satisfy the ordered requirements of precision and particularity; and it may well be, as plaintiff urges, that the general overbroad notice is also in-

sufficient, as measured against United Hospital Center's by-laws. "[d]efective notice, the change in the purpose of the meeting without further notice, and the failure ... to recognize the invalidity of the ... (earlier) revocation, denied ... (Plaintiff) due process of law." Huntley, supra.

If United Hospital Center, Inc., has chosen to base this mandated due process hearing upon an overbroad or otherwise unacceptable notice that does not meet due process standards; or, on the other hand, if United Hospital Center, upon proper notice, fails at the hearing to satisfy substantive due process, then, in either event, the issues are preserved to the plaintiff and the Court will act upon the same at a later stage in this action.

It is further ORDERED that the

earlier stated termination schedules for the development of this matter shall be maintained, subject to further order of the Court, and the hearing officer may proceed to schedule hearing dates as he shall determine.

ENTER: July 8th, 1974.

/s/ Robert E. Maxwell
United States District Judge

APPENDIX E

Order

(Filed June 11, 1974)

IN THE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF
WEST VIRGINIA

RAY A. HARRON,
Plaintiff,

v. Civil Action No. 73-26-C

UNITED HOSPITAL CENTER, INC.,
ET AL.,
Defendants.

ORDER

On the 13th day of May, 1974, came the plaintiff, in person, and by David Epstein and Jerald E. Jones, his attorneys, also came the defendant, J.D.H. Wilson, by Herschel Rose, his attorney, the defendant, E. Burl Randolph, by James A. Marstiller, his attorney, and the defendants, United Hospital Center, Inc., Herbert G. Underwood, Margaret Criswell,

Oscar Andre, Luther Berry, Harry Berman, The Reverend Joseph DeBardi, Graham Lynch, William M. Walker, M.D., Clarence Fiber, Sr., Cecil B. Highland, Jr., Robert Hess, M.D., James Jarvis, Sister Rita Marie Vonberg, Don P.Smith, Lynwood D. Zinn, M.D., and Donald E. West, individually, and as members of the Board of United Hospital Center, Inc., by James E. McNeer and Clara Mattern, their attorneys. The defendants, Monongahela Hospital Service, Inc., and Medical-Surgical Service, Inc., did not appear by their officers or counsel.

Thereupon the Court, without argument by counsel, denied the following motions made by defendants (without prejudice to the right of these defendants to renew said motions at a later time):

(1) The motion of defendant J.D.H. Wilson, for summary judgment.

(2) The joint and several motion for summary judgment of the defendants, United Hospital Center, Inc., Herbert G. Underwood, Margaret Criswell, Oscar Andre, Luther Berry, Harry Berman, The Reverend Joseph DeBardi, Graham Lynch, William N. Walker, M.D., Clarence Fiber, Sr., Cecil B. Highland, Jr., Robert Hess, M. D., James Jarvis, Sister Rita Marie Vonberg, Don P. Smith, Lynwood D. Zinn, M.D., and Donald E. West, individually and as members of the Board of Directors of United Hospital Center, Inc.

(3) The joint and several motion to dismiss for lack of jurisdiction as to the defendants, United Hospital Center, Inc., Herbert G. Underwood, Margaret Criswell, Oscar Andre, Luther Berry Harry Berman, The Reverend Joseph DeBardi, Graham Lynch, William N. Walker M.D., Clarence Fiber, Sr., Cecil B. Highland,

Jr., Robert Hess, M.D. James Jarvis, Sister Rita Marie Vonberg, Don P. Smith, Lynwood D. Zinn, M.D. and Donald E. West, individually and as members of the Board of Directors of United Hospital Center, Inc.

The Court having further considered the pleadings herein together with their exhibits; the pretrial order submitted by the parties, together with its exhibits; the discovery depositions filed herein, together with their exhibits and the positions of all the parties, and believing the threshold question herein is procedural due process, and to that end the Court believes that in order to develop the right kind of record in this case an administrative-type due process hearing, which has not to this time been had, should be conducted as required by Section 7.04 of the bylaws of the United

Hospital Center, Inc., as to plaintiff's change of status and reduction of staff privileges effective November 1,1973.

It is, therefore, ORDERED:

(1) That on or before the 28th day of May, 1974, the plaintiff, Ray A. Harron, shall be given by the defendant, United Hospital Center, Inc., a written statement of the particular grounds relative to the change of status or reduction of his privileges to practice as a member of the Medical Staff of United Hospital Center, Inc., after November 1, 1973. Such notice shall conform to that which due process requires to a person in the status of the plaintiff.

(2) That commencing on the 17th day of June, 1974, or as soon thereafter as practicable, the Joint Conference Commit-

tee of the United Hospital Center, Inc., shall hold hearings upon the above-mentioned written statement of grounds, which said hearings shall be concluded by August 2, 1974, and the report thereof, including the findings and decisions of said Joint Conference Committee, shall be in accordance with the provisions, insofar as they are applicable, to Rule 52(a), Federal Rules of Civil Procedure, and shall be filed with the Court not later than August 30, 1974.

3) The plaintiff, during the presentation of such evidence and other matters as may be offered by defendants in support of the statement of grounds relative to the plaintiff's change of status and reduction of staff privileges after November 1, 1973, as a member of the medical staff of United Hospital Center, Inc., shall have the right to confront and

by counsel cross-examine witnesses presented by defendants; and in addition shall have the opportunity to be heard by said Joint Conference Committee, to present evidence, both oral and documentary, to be represented by counsel at all times and on all occasions, and he shall have access to all relevant hospital records, or copies thereof in the absence of original records.

(4) The Honorable Robert T. Donley, Attorney at Law, Morgantown, West Virginia, is hereby appointed by the Court as a hearing officer to preside at the Administrative Proceedings to be concluded by the Joint Conference Committee of the United Hospital Center, Inc. The hearing officer shall determine the location, dates and times of the hearings contemplated herein and shall preside over the said hearings and the order of proceeding

thereof, and shall call upon the Court for any directions and guidance he deems necessary, and shall report forthwith to the Court any untoward conduct that may appear or present itself during said hearing.

(5) The costs of the hearing officer and the costs of the court reporter for taking and transcribing the testimony during the hearings of the Joint Conference Committee shall be paid, one-half by plaintiff and one-half by defendants, at the conclusion of the hearings ordered herein. Adjustments between the parties may be made by the further order of the Court in the final settlement of the total costs and expenses of this litigation.

ENTER: June 11, 1974.

/s/ Robert E. Maxwell
United States District Judge

APPENDIX F

Complaint

(Filed November 15,1973)

IN THE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF
WEST VIRGINIA

RAY A. HARRON,
Plaintiff

v. Civil Action No. 73-26-C

UNITED HOSPITAL CENTER, INC.,
ET AL.,
Defendants.

COUNT III
(Monopoly)

30. Plaintiff Harron incorporates and adopts by reference all the allegations contained in Paragraphs 1-26 of this Complaint, with like effect as if herein fully repeated.

31. The acts herein alleged to have been done by the Defendants have resulted in the restraining of interstate commerce in Harrison County, West Virginia and

elsewhere, and have tended to, and actually created a monopoly in the County; and Plaintiff Harron has been injured in his profession, business, and property by reason of the doing of those acts in violation of the antitrust laws.

32. Plaintiff Harron and Defendants engage in interstate commerce as follows:

(a) Many patients treated at the hospital are persons who are traveling through the State, as the hospital is located near a major interstate highway system;

(b) UHC and the Radiology Department treat occupational injuries which occur at nearby projects involving the use of many employees who are out of state residents; for example, at the Haywood Power Station and in the construction of a major highway network;

(c) Much of the equipment and supplies involved in operating the hospital are purchased from sources out of the state;

(d) Members of the Medical Staff frequently attend out-of-state refresher courses to maintain high professional standards and, on occasion, out-of-state physicians perform work at the hospital on a temporary basis;

(e) Insurance coverage for hospital and medical care of patients treated at UHC and the Radiology Department is provided by companies operating in interstate commerce.

33. Defendants entered into a conspiracy to prevent Plaintiff Harron and other radiologists from performing radiological work at UHC, and to place all radiological work in Harrison County within the direct control of Defendant Wilson, thereby allowing him personally or through employees to perform all radiological services in Harrison County and also subsequently to raise fees charged for radiological services. To that end, and for that purpose, Defendants connived and conspired with each other to do and make, and pursuant to the conspiracy did and made the following acts and contracts:

(a) Defendant Randolph, President of the Medical Staff at UHC, during the aforedescribed period, advised various physicians on the Medical Staff to cease and desist from referring radiological work to Plaintiff Harron; and at the UHC

Medical Staff Meeting of July 9, 1973 deliberately and intentionally made detrimental misrepresentations affecting Plaintiff Harron to the members of the Medical Staff concerning the Radiology Department;

(b) Defendant Francis, at the UHC Medical Staff Meeting of July 9, 1973 deliberately and intentionally made detrimental misrepresentations affecting Plaintiff Harron to the members of the Medical Staff concerning the Radiology Department;

(c) Defendant Wilson, on or about June-July, 1973 conspired with Defendant UHC Board to negotiate an Agreement excluding Plaintiff Harron and other radiologists from the exercise of rights and privileges on the Medical Staff and such Agreement was consummated on October 16, 1973. (Exhibit C.)

(d) Defendant UHC Board, on or about June-July 1973 conspired with Defendant Wilson to negotiate an Agreement excluding Plaintiff Harron and other radiologists from the exercise of rights and privileges on the Medical Staff and such Agreement was consummated on October 16, 1973. (Exhibit C.)

(e) Defendant Monongahela Valley, through threats and the exercise of economic power affecting payment on claims due to members of the Medical Staff attempted to intimidate and coerce

members of the Medical Staff to act to the detriment of Plaintiff Harron during the aforedescribed period;

(f) Defendant UHC Board, during the period June 1973 to November 1, 1973, engaged in deliberate and intentional conduct which hindered Plaintiff Harron's assertions of his rights and privileges as a member of the Medical Staff (1) by refusing to state the reasons for the action taken affecting Plaintiff Harron; (2) by adopting a resolution on August 21, 1973 prohibiting the verbatim recording of deliberations at meetings of the Medical Staff where issues affecting Plaintiff Harron were discussed unless unanimous consent of the Medical Staff was received.

COUNT IV
(Restraint of Trade)

34. Plaintiff Harron incorporates and adopts by reference all the allegations contained in Paragraphs 1-26 of this Complaint, with like effect as if herein fully repeated.

35. Plaintiff Harron and other radiologists similarly situated have a common interest in maintaining a free and unhampered market for the purchase

and distribution of radiological services, medicines supplies, equipment and facilities from those controlling, providing, and distributing medicines,supplies, equipment and facilities necessary for the conduct of the profession. Plaintiff Harron and other radiologists wholly depend on their ability to purchase and use the radiological services, equipment, medicines, supplies and facilities at a fair market price.

36. On or about November 1, 1973 Defendant Wilson, pursuant to a contract executed on or about October 16, 1973 by Defendant Wilson and Defendants UHC - Board and Francis, as described more fully in Paragraph 22 of this Complaint, commenced,thereafter continued, and still continues to control and restrain the marketing, sale, and distribution of radiological services, medicines,

supplies, equipment and facilities as the exclusive agent thereof in Harrison County, West Virginia, thereby affecting all patients in interstate commerce who are in need of such radiological services medicines, supplies, equipment and facilities.

37. The contract of October 16, 1973 as alleged in Paragraph 36 above was undertaken by Defendants as part of a conspiracy to fix, control, raise and stabilize arbitrarily, unlawfully, unreasonably and knowingly the price of radiological services, and to preclude Plaintiff Harron and other radiologists who provide radiological services from dealing in interstate commerce except on the terms controlled by Defendants, in violation of Title 15, U.S.C. §1.

38. From and after November 1, 1973 Defendants in pursuance of their

conspiracy alleged above prevented Plaintiff from purchasing radiological equipment, use, supplies, and facilities from Defendant UHC at the times they were made available, and refused Plaintiff Harron's orders at the times and in the quantities required by Plaintiff Harron to perform his professional duties.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-954

RAY A. HARRON, *Petitioner*,

v.

UNITED HOSPITAL CENTER, INC., *et al.*, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: February 4, 1976

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, United Hospital Center, Inc., and its officers and directors (hereinafter "UHC" or "the hospital"), oppose the petition for a writ of certiorari filed herein by Ray A. Harron. That petition asks this Court to consider a common and entirely reasonable hospital practice, and is unworthy of the Court's consideration. The petition should be denied.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit from which review is sought is reported at 522 F.2d 1133.

QUESTION PRESENTED

Is a contract between a hospital and a radiologist, pursuant to which the radiologist is granted control over the use of the hospital's radiology equipment in exchange for a commitment to provide the radiology services required by the hospital, subject to the Sherman Act, and, if it somehow is, does it violate that Act?

STATEMENT OF THE CASE

Because Petitioner's Statement of the Case omits most of the relevant facts, the hospital's Statement necessarily will be longer than would normally be required. The following facts are drawn from the depositions taken in this matter and from the findings of the District Court and the Court of Appeals.

Essentially, the suit brought by Petitioner, Dr. Harron, challenges the right of a hospital to determine how its own radiology department will be administered and its right to select what radiologist (and how many) it will contract with to ensure that the radiology department meets the needs of the hospital and its patients.

From the beginning of relevant time, there were two hospitals in Clarksburg, West Virginia – St. Mary's, operated by an Order of the Roman Catholic Church, and Union Protestant, operated by the Methodist Church. Dr. John D.H. Wilson was the radiologist at St. Mary's; Dr. Harron was the radiologist at Union Protestant.

Practically all hospitals in this country fulfill their responsibility to provide certain medical services – traditionally, radiology, pathology and anesthesiology and increasingly other specialties such as nuclear medicine and cardiac catheteriza-

tion – by contracting with one doctor to be in charge of the department and to be responsible for providing the services required by the hospital (with the assistance of whatever number of associated physicians under his supervision may be necessary). Such arrangements have been upheld by the courts, both state and Federal, each and every time they have been challenged (often on grounds similar to those asserted by Petitioner here).[1]

These cases, and the expert testimony in this case (in deposition) establish that such an "exclusive" contract is the best method of providing radiology services. It is necessary to ensure accountability, to ensure that services are performed 24 hours a day, seven days a week, and to integrate the radiology services into the complex scheduling of a hospital.

Dr. Harron was the exclusive radiologist at Union Protestant. Dr. Wilson was the exclusive radiologist at St. Mary's. Each used the radiology equipment at the other physician's hospital only occasionally and only with the permission of the other.[2]

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[1] See *Adler v. Montefiore Hospital Association of Western Pennsylvania*, 453 Pa. 60, 311 A.2d 634 (1973), *cert. denied*, 414 U.S. 1131 (1974); *Benell v. City of Virginia*, 258 Minn. 559, 104 N.W.2d 633 (1960); *Blank v. Palo Alto-Stanford Hospital Center*, 234 Cal.App.2d 377, 44 Cal. Rptr. 572 (Ct. App. 1965); *Letsch v. Northern San Diego County Hospital District*, 246 Cal.App.2d 673, 55 Cal. Rptr. 118 (Ct. App. 1966); *Rush v. City of St. Petersburg*, 205 So.2d 11 (Fla. 1967); *Dell v. St. Joseph Mercy Hospital of Detroit* (E.D. Mich., Civil No. 4-70668, May 9, 1974), *aff'd on other grounds without published opinion*, 511 F.2d 1403 (6th Cir. February 20, 1975); *Dattilo v. Tucson General Hospital*, 23 Ariz. App. 392, 533 P.2d 700 (1975).

[2] Dr. Harron's exclusive arrangement derived from his contract with Union Protestant, which enabled him to determine, as is customary, who would use the hospital's radiology equipment. Dr. Wilson's exclusive arrangement resulted from the fact that he owned the radiology equipment at St. Mary's.

After long and complex negotiations, the two hospital merged in the summer of 1970 in order to pool their resources, avoid duplication, and thus provide a higher quality of hospital care than either could supply alone. Specifically the merged hospital (Respondent, United Hospital Center) determined to construct a new hospital. Planning of the new facility began at the same time that the merger was effected. Construction will be completed by the end of 1976.

Since the hospitals had merged into one institution and were planning for the time when there would be one physical plant, the duplicate departments of the two predecessor hospitals had to be merged. By January 1, 1972, all departments had successfully been merged with one exception – the two radiology departments. The two radiologists (Dr. Harron and Dr. Wilson) were unable to agree on a method for combining into one entity with which UHC could contract for the operation of its radiology department.

Because Dr. Wilson and Dr. Harron had been unable to form a joint entity (although it was their stated intention to do so), the two radiology departments operated after the merger as they had before. Dr. Harron practiced as the exclusive radiologist at Union Protestant under successive six-month extensions of his contract which were granted to provide time to work out arrangements with Dr. Wilson and with UHC. The extensions of Dr. Harron's contract expired on December 31, 1971. Dr. Wilson continued as the exclusive radiologist at St. Mary's.

The operation of two separate radiology departments violated the purpose and the spirit of the merger of the two hospitals into UHC. In order to place the two radiology departments under single administrative control and

to provide for continuing radiology services in the absence of an agreement, the hospital decided to implement, effective January 1, 1972, a different arrangement as an interim measure until Dr. Harron and Dr. Wilson could form a single entity which UHC could negotiate a contract.

The hospital determined that its radiology department would not be operated under contract with either Dr. Harron or Dr. Wilson, but that instead each radiologist could use the radiology facilities at each plant.[3] The hospital provided that each member of the medical staff could designate which of the two radiologists he preferred. To provide for administration of the merged radiology department, Dr. Wilson was named administrative head of the department without, however, control over the professional activities of Dr. Harron.

The hospital quickly learned that this arrangement would not work. The same circumstances which had prevented the two radiologists from agreeing to form a merged entity and had led to the hospital's formulation of this interim measure prevented it from working. A severe personality clash between Dr. Wilson and Dr. Harron combined with the new arrangement to adversely affect patient care in a number of ways:

—The two radiologists engaged in an unseemly competition for patients, and accusations were made against both doctors that each had appropriated radiology cases intended for the other.

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[3] Effective January 1, 1972, the hospital purchased the radiology equipment owned by Dr. Wilson at the St. Mary's plant and from that date all the radiology equipment at the two plants was owned by UHC.

–Radiology technicians were caught between the two radiologists and were unable to comply with two different sets of directions for performing a particular radiology procedure.

–There was no coordination between the radiologists. In one instance a patient of Dr. Harron's was kept under anesthesia an unnecessary additional 30-45 minutes because the technician Dr. Harron needed to perform a radiology procedure was caring for a patient of Dr. Wilson's.

–Upon other occasions, one radiologist would be using equipment that the other needed.

–Scheduling in the hospital was adversely affected, confusing in particular the dietary and nursing departments, who were unable properly to coordinate patient care and feeding with radiology treatments.

–Staff morale was affected, particularly since physicians were forced to take sides between the two competing radiologists.

–The two radiologists could not agree on what radiology facilities they would recommend to the hospital for inclusion in the new building.

Four different outside experts came to Clarksburg to help solve the problem. They immediately recognized the harmful effects the experimental arrangement was having on the patients and the medical staff, and each recommended that the two radiologists form a merged entity with which the hospital could contract. The hospital continued its efforts to bring the two radiologists together, but the merged entity still was not formed.

Members of the medical staff of the hospital complained to the Board of Directors that there was a "serious

problem" "affecting patient care" and that a solution was urgently required. As the President of the Board stressed in deposition, "I can't state it more forcefully than that Radiology was a problem all the time."

At a meeting of the medical staff the physicians voted by a substantial margin to recommend to the hospital board that if it decided to enter into an exclusive contract for the operation of the radiology department, it do so with Dr. Wilson. Dr. Harron stated at this meeting that if the board did determine to enter into an exclusive contract, he "wouldn't want it."

Subsequently the Board decided to enter into an exclusive contract with Dr. Wilson and such a contract, dated October 16, 1973, was executed, effective November 1, 1973. This contract provides that Dr. Wilson is solely responsible for the provision of radiology services required by the hospital, and it preserves the right of any other member of the medical staff to read X-rays and provide consultative services upon request. Dr. Harron continues as a member of the hospital's medical staff and as such may make readings of any films taken in the hospital by the radiology department (if requested by a patient's attending physician), but he may not use the hospital's X-ray equipment without permission. In effect UHC reinstituted the system that had been in effect at both its predecessor hospitals – a contract with one radiologist for the operation of the radiology department, with other radiologists on the medical staff permitted to consult but not to use the hospital's X-ray equipment without the permission of the hospital's radiologist.

The medical staff has informed the hospital that after the exclusive contract with Dr. Wilson went into effect the problems in the radiology department were resolved and that the department has functioned well.

Dr. Harron continues to practice his profession. When he was the radiologist at United Protestant and later when he was one of the radiologists at UHC, Dr. Harron practiced in a number of other institutions in the area around Clarksburg. At the time his deposition was taken (January 1974), he was performing radiology services at three – and perhaps six – institutions around Clarksburg.[4]

Dr. Harron instituted the instant action on November 15, 1973. He moved for a temporary restraining order (which was denied) and for a preliminary injunction to require the hospital to abrogate its contract with Dr. Wilson and return to the prior unworkable arrangement whereby both radiologists were responsible for radiology services. Extensive discovery ensued. On November 6, 1974 the District Court granted Dr. Harron's motion for a preliminary injunction, and required the hospital to reinstitute what the District Court itself found was an "unsatisfactory" arrangement. (Pet. App. C, 3) It did so on the ground that the hospital was required to hold a due process hearing before entering into the contract with Dr. Wilson. The District Court did not consider the asserted antitrust violations. The preliminary injunction was stayed pending appeal.

On appeal the hospital argued that the preliminary injunction should be dissolved. It urged, *inter alia*, that Dr. Harron was not likely to prevail on the merits. Although the appeal was brought from the preliminary injunction, Dr. Harron urged the Court of Appeals to rule on the merits. As he said in his brief:

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[4] A contract Dr. Harron made with an associate radiologist on September 9, 1973, reveals that he had contracts to provide radiology services in six named institutions, but Dr. Harron refused to answer questions about three of them.

> "As for the ultimate likelihood of success in this case, there are no additional facts for the Trial Court to determine. This court [the Court of Appeals] is called upon here to issue a ruling on the merits, even though the case is technically at the stage of an application for a preliminary injunction."

The Court of Appeals accommodated Dr. Harron, and ruled on the merits. It held that no hearing was required, that the alleged acts did not violate the Sherman Act, and that therefore there was no Federal jurisdiction. In the words of the Court:

> "It is frivolous to urge that the employment of a single doctor to operate the radiology department of a hospital invokes the Sherman Act and the civil rights statutes pleaded." (Pet. App. B, 6)

The Court of Appeals directed the District Court to dismiss the complaint for lack of Federal jurisdiction. The District court did so on October 22, 1975. Petitioner's petition for a writ of certiorari followed.

REASONS THE WRIT SHOULD NOT BE GRANTED

In his petition to this Court Dr. Harron urges that certiorari be granted on one question – the dismissal of the counts of the complaint alleging violations of the Sherman Act. Dr. Harron does not ask this Court to review the determination of the court below that no hearing was required. Even as thus limited, however, Dr. Harron's petition should be denied.

I. THE SHERMAN ACT QUESTIONS WERE NOT ARGUED BY PETITIONER AND WERE NOT CONSIDERED IN DEPTH BY THE COURTS BELOW.

The first and most obvious reason why this Court should not grant the writ is that it would not have the benefit of any analysis of the antitrust question by the courts below. The gravamen of Dr. Harron's complaint is that he was entitled to a due process hearing, and his tactical judgment below was to concentrate exclusively on that issue. He submitted no brief to the District Court on the Sherman Act questions, and the District Court did not consider this issue. Dr. Harron's brief to the Court of Appeals did not mention the Sherman Act questions. Although he sought that Court's decision on the merits, he was content to rely on his allegation that he was entitled to a hearing. The Court of Appeals, in directing dismissal of the complaint, necessarily determined that no violation of the Sherman Act was made out by the complaint, but it did so with a minimum of discussion since the matter had not been raised by Dr. Harron.

This case, therefore, comes to this Court without any refinement by the lower courts of the issue presented by Petitioner.

II. THIS CASE DOES NOT PRESENT THE SAME ISSUE AS *HOSPITAL BUILDING COMPANY* DOES.

Petitioner premises his request for the writ upon the assertion that the question presented by the instant case is the same as that which is presented in *Hospital Building Company v. Trustees of the Rex Hospital* (No. 74-1452, *cert. granted* October 6, 1975), and that this Court should grant the writ in order to consider this case with or in

light of *Hospital Building Company*. But this suggestion is erroneous: the Sherman Act issues before this Court in *Hospital Building Company* are not in fact present in the instant case.

The basic issue in *Hospital Building Company* is whether the conspiracy there alleged was in interstate commerce or had a sufficient effect on interstate commerce to bring it within the jurisdictional purview of the Sherman Act. A fair reading of the opinion below, however, indicates that the Court of Appeals did not base its decision on the jurisdictional grounds at issue in *Hospital Building Company*. The opinion below holds that "It is frivolous to urge that the employment of a single doctor to operate the radiology department of a hospital invokes the Sherman Act . . . ." The court below, thus, apparently determined that even *if* interstate commerce were affected by the actions complained of, they did not violate the substantive terms of the Sherman Act.

III. THE DECISION BY THE COURT BELOW THAT THE HOSPITAL'S CONTRACT FOR OPERATION OF ITS RADIOLOGY DEPARTMENT DOES NOT VIOLATE THE SHERMAN ACT IS CORRECT.

The jurisdictional issue which Petitioner seeks to bring to this Court is in any event irrelevant. For the Court of Appeals was correct in determining that even if the agreement between the hospital and Dr. Wilson came within the jurisdictional purview of the Sherman Act, it does not violate that Act.

An agreement between a hospital and a physician to operate the hospital's radiology department is not in restraint of trade, nor does it in any way represent an attempt at monopolization. The Sherman Act does not prohibit a firm from contracting with one person to use its

equipment or to provide services for it. Certainly a business is permitted to enter into a contract with one supplier or with one law firm. The need for a hospital to have such an arrangement for provision of its radiology services is even greater. Accordingly, it is an almost universal hospital practice.

It should be recalled that other physicians were free to compete for the contract, and Dr. Harron does not allege that he was precluded from that competition. Moreover, the hospital's contract with Dr. Wilson does not preclude Dr. Harron or other radiologists from competing for radiology "business" in the Clarksburg area. While the contract provides that other radiologists cannot use UHC's equipment, that is certainly a normal function of UHC's ownership, and it does not in any way affect their ability to enter into contracts with other institutions in the area to operate their radiology departments, or to set up their own radiology clinics. As mentioned above, Dr. Harron was serving as the radiologist in at least at three other places.[5]

Finally, even if the contract were somehow deemed to be a restraint of trade, it would be an entirely reasonable one. It is established by common practice and the deposition testimony in this case that such an exclusive arrange-

[5] Dr. Harron apparently does not allege any restrictions on his ability to practice in institutions other than UHC. Paragraphs 33 and 36 of his Complaint, both of which make general and conclusory allegations that UHC conspired to control all radiology work in Harrison County, are based on the contract between Dr. Wilson and the hospital. The contract, however, relates only to the hospital's Radiology Department and does not in any way restrict Dr. Harron's ability to practice elsewhere. As mentioned, Dr. Harron is in fact serving at least three and probably six other institutions in the area of Clarksburg.

ment is necessary for the hospital to discharge its responsibilities. The reasonableness of such an arrangement is all the more evident in the particular circumstances of this case: the hospital had experimented with another arrangement and that arrangement had proved to be clearly harmful.

IV. EVEN IF THE OPINION OF THE COURT BELOW WERE CONSTRUED TO BE BASED ON JURISDICTIONAL GROUNDS, THIS CASE WOULD BE ENTIRELY DIFFERENT FROM *HOSPITAL BUILDING COMPANY*

Even if the opinion of the court below were read, as Petitioner urges, as holding that the jurisdictional prerequisites of the Sherman Act had not been satisfied, it would not present the same issues as *Hospital Building Company*.

The circumstances present in the instant case are entirely different from those in *Hospital Building Company*. The latter case involves an alleged conspiracy to prevent an interstate owner and manager of hospitals from trebling the capacity of one of its hospitals. Here, however, the gravamen of Dr. Harron's allegations is merely that a hospital's decision to operate its radiology department by contracting with one radiologist instead of two radiologists somehow violates the Sherman Act.

The manner in which one local hospital's radiology department is operated has no effect on interstate commerce – and certainly it is entirely different in both kind and degree from a conspiracy that would prevent an interstate entrepreneur from trebling the capacity of one of its hospitals. There may be a question whether an entire hospital is in interstate commerce. But the activities of just one of a hospital's many departments

cannot affect interstate commerce except to the most minimal degree.[6] Furthermore, whatever purported connection UHC's radiology department may have with interstate commerce, it is important to note that the hospital's contract with Dr. Wilson will not have any effect on it. The agreement complained of does not relate to matters of interstate commerce. Petitioner in *Hospital Building Company* argues on the basis of *Goldfarb* that "a purely local conspiracy can substantially affect interstate commerce if the activities restrained are an integral part of interstate transactions."[7] But the contract here does not restrain any activities that are part of interstate commerce. The volume of radiology work at United Hospital Center is the same whether Dr. Wilson is solely responsible for operating the hospital's radiology department or whether Dr. Harron joins in the operation of the department.[8] Even though the Radiology Department may have out-of-state suppliers, interstate commerce is not affected by the agreement.

In his Petition, Dr. Harron seeks to construct an elaborate chain of causation by which the contract between Dr. Wilson and UHC might have an effect on interstate commerce. He suggests that Dr. Wilson will be able to set

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[6] As stated in Defendants' Answer herein, a study of UHC admissions in 1973 showed that only ½ of 1% of its admissions listed out-of-state addresses. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), this Court found the requisite nexus with interstate commerce in the fact that "the transactions which create the need for the particular legal services in question frequently are interstate transactions." 421 U.S. at 783. Very few of the "transactions" which create the need for radiological services at UHC are the result of admitting out-of-state patients.

[7] Petitioner's Brief, p. 17

[8] Dr. Wilson handles the work that Dr. Harron and his group would have performed by securing addititional associate radiologists of his own.

his own rates, that other radiologists in West Virginia will follow suit, and that ultimately radiologists over the entire country will raise their rates accordingly. This fanciful exercise is so patently far-fetched that it requires no response.

CONCLUSION

Petitioner asserts that this court should grant the writ to consider whether a hospital's contract with a radiologist violates the Sherman Act. But this issue has not been considered in any depth by the court below. Further, it is clear that such a contract neither falls within the jurisdictional scope of the Sherman Act nor violates that Act. And this case does not involve the issue which is presented by *Hospital Building Company*. This case does not warrant this Court's consideration, and the petition should be denied.

Respectfully submitted,

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